SUPREME COURT, U.S.

No. 607 21

Office - Supreme Court, U. S.
FILED
FEB 18 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.

Petitioners;

vs.

L. O. BENTON, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

T. M. CUNNINGHAM,
26 Bryan Street, East
Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan Street, East
Savannah, Ga.

WALTER A. HARRIS,
Persons Building
Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee.

WALLACE MILLER,
Persons Building
Macon, Ga.
Attorney for South Western Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.

Petitioners,

vs.

L. O. BENTON, JR., et al.,

Respondents.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, and South Western Railroad Company, respectfully petition that a Writ of Certiorari may issue to the United States Circuit Court of Appeals, Fifth Circuit, to bring up the record from and to review the judgment of that Court rendered January 13, 1948, in the case of L. O. Benton, Jr., et al., Appellants, v. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, et al., Appellees, No. 12,130, and that the judgment in said case may be reviewed and reversed, and in support of this petition respectfully show:

1. This Court has jurisdiction to review the judgment in question under Judicial Code Section 240, as amended (U.S.C.A. Title 28 Sec. 347).

2. The facts are all contained in the findings of fact of the District Court (R. 59-74), and in a stipulation (R. 98-100). There are no facts in dispute.

3. That L. O. Benton, Jr., et al., Stockholders of South Western Railroad Company, brought a proceeding in the Superior Court of Bibb County, Georgia against South Western Railroad Company and its Officers and Directors, the sole purpose of which was to interfere with and prevent the consummation of the Reorganization Plan of Central of Georgia Railway Company as to the acquisition by the reorganized Company of the railroad properties of South Western (leased by Central) which are an important part of the Plan; that the State Court has no jurisdiction of the subject matter, and that the State Court suit is an invasion of the prior and exclusive jurisdiction of the Bankruptcy Court and the Commission. The District Court enjoined this State Court proceeding. The Court of Appeals by a majority decision (Judges Holmes and Lee concurring, and Judge Hutcheson dissenting) has sanctioned the proceeding in the State Court, and it is this decision of which we complain.

4. Central of Georgia Railway Company (hereinafter called "Debtor"), is being reorganized in a proceeding instituted by it under Section 77 of the Bankruptcy Act, as amended, in the United States District Court for the Southern District of Georgia, Savannah Division.

5. The Plan of Reorganization (hereafter referred to as the "Plan") of the Debtor has been approved by the Court, voted on by the creditors, and confirmed by the Court, and is awaiting consummation.

6. The Plan provides for acquisition of the railroad properties of South Western Railroad Company (hereafter called "South Western") by the reorganized Company, in exchange for certain securities to be issued by the reorganized Company. South Western comprises about 340 miles and has been under lease to Central and its predecessor since June 24, 1869, and is an important and integral part of the Central System, and is being operated by the Trustee of the Debtor. It is optional with South Western whether it accepts or rejects the Plan, but if it rejects it, the Plan provides that the lease shall be disaffirmed. The Plan further provides that if South Western is acquired, its railroad, the personal property appurtenant thereto, and all real estate shall be conveyed to the reorganized Company and that South Western shall waive all damages on account of any breach of lease and shall waive all claims in respect of equipment.

7. The law of Georgia provides that any railroad corporation organized under the laws of Georgia which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operation of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation, upon such terms as may be agreed upon by the Board of Directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Georgia Laws 1933, p. 235; Code of Georgia of 1933, Sect. 94-328).

8. As authorized by the above-quoted provision of the Georgia law, and in pursuance thereof, the Directors

of South Western resolved to accept the Plan, subject to the assent of the holders of a majority of its stock, which was given at a meeting of the stockholders held March 28, 1947, 30,137 shares of stock being voted in favor of acceptance and 9,057 shares against. The capital Stock of South Western consists of 51,911 shares. South Western duly notified the Commission of its acceptance of the Plan on March 28, 1947.

9. The Directors of South Western resolved to accept the Plan subject to the assent of the majority of the stock, which was given at a meeting of the Stockholders held March 28, 1947, 30,137 shares of stock being voted in favor of acceptance, and 9,057 shares against. The Capital Stock of South Western consists of 51,191 shares. South Western duly notified the Commission of its acceptance of the Plan.

10. March 25, 1947, L. O. Benton, Jr., et al., Stockholders of South Western, brought a petition in Equity in the Superior Court of Bibb County, Georgia, against South Western and its Officers and Directors. The gravamen of this case was that the Charter of South Western contained no authority to sell and convey all its railroad property; that a sale of its property was, therefore, ultra vires; and that no subsequent legislation could confer power to sell without impairing the obligations of the contract as among the Stockholders. The prayers of this petition were that the South Western Stockholders' meeting which was to be held March 28, 1947, should be enjoined, and that if this meeting was not enjoined and the Stockholders should vote by a majority to accept the Plan, that then the Defendants should be enjoined from doing anything which might tend to

consummate the Plan with respect to acquisition of the property of South Western. A rule was issued on this petition which was argued on March 26th and 27th, and the Court then adjourned the hearing without taking any action on the petition.

11. April 18, 1947, Merrel P. Callaway, as Trustee of the Debtor, filed a proceeding in the Bankruptcy Court against L. O. Benton, Jr., et al., Plaintiffs in the above stated suit in the State Court, and against South Western, to enjoin the further prosecution of the State Court suit, on the grounds that the Bankruptcy Court and the Commission were engaged in reorganizing a railroad and that they had exclusive jurisdiction over the Plan and its execution and consummation, and that the Commission had exclusive and plenary jurisdiction of the acquisition of one railroad by another, and that the State Court proceeding was an attempt to interfere with and frustrate the Plan as to acquisition of South Western; that the State Court had no jurisdiction, whatever, over the matter of the acquisition of one railroad by another; and that the Bankruptcy Court and the Commission had prior and exclusive jurisdiction over the subject matter. On this petition the Judge of the District Court granted a temporary restraining order against the Respondents.

12. April 24, 1947, the Judge of Bibb Superior Court, of his own motion issued an opinion and an interlocutory injunction in the Benton case (R. 246). He held that South Western had no power to convey its property and issued an order that South Western and its Officers and Directors were enjoined from carrying into effect any conveyance of the property of the

South Western "not authorized by a unanimous vote of the Stockholders" of South Western, from accepting the Plan (which had already been accepted), and "from doing or performing any act in behalf of the Defendant Railroad Company which might tend to consummate the Plan of Reorganization of the Central of Georgia Railway Company, with respect to the acquisition by that Company of the properties of South Western Railroad Company."

13. Thereupon, on May 26, 1947, the Trustee of the Debtor amended his petition and called the attention of the Bankruptcy Court to the order of the State Court Judge, and alleged that the said injunction of the State Court was in excess of the jurisdiction of the Superior Court of Bibb County, and invades the exclusive jurisdiction of the Bankruptcy Court and is an attempt to prevent South Western from consummating its acceptance of the Reorganization Plan; and, accordingly, the amended petition prayed: (a) that the Court would adjudicate the question whether under the circumstances of this case, it is the law of Georgia that South Western could not accept the Plan and convey its property in pursuance of the Plan without unanimous consent of its Stockholders; (b) that the Court would decree that if it is the law of Georgia that unanimous consent of stockholders is necessary in the premises, that under the powers conferred on the Bankruptcy Court and the Commission which are superior to the State laws, that the South Western may, notwithstanding, accept and consummate the Plan; (c) that the order of the Judge of the Superior Court may be annulled and be adjudged to be null and void, and that when the Plan is confirmed, the Court will

pass such order as will make effective the acceptance and consummation by South Western and its Officers and Directors. After argument, the Bankruptcy Court August 15, 1947, granted a permanent injunction against the Plaintiffs in the State Court case from prosecuting that case, and declared the injunction granted in the State Court case null and void and of no effect. L. O. Benton, Jr., et al., appealed to the United States Circuit Court of Appeals, Fifth Circuit, from this judgment.

14. The majority opinion of the Circuit Court of Appeals which holds that the Bankruptcy Court did not have prior and exclusive jurisdiction over the controversy, and the judgment of the said Court of Appeals is erroneous on the following grounds:

(a) because South Western is a creditor of the Debtor, holding a claim against the Debtor under an unexpired lease;

(b) because the Commission's Plan, approved by the Court, provided that unless South Western accepted the provisions of the Plan with respect to the sale of its railroad properties to the reorganized Company, its lease would be disaffirmed;

(c) because the Commission has the power under the Bankruptcy Act to prescribe in its Plan of Reorganization of the Debtor the conditions upon which the executory contracts of the Debtor, including unexpired leases, may be rejected.

(d) The sole and only purpose of the suit of L. O. Benton, Jr., et al., in the State Court was to

interfere with and defeat the Plan of Reorganization as it related to South Western.

(e) The holding of the Court of Appeals that the res was the reversionary interest of South Western in its leased property, and this not being in the possession of the Bankruptcy Court, that the State Court had jurisdiction to decide the question whether South Western could convey this interest without unanimous vote of its Stockholders, involves a total misconception of the scope of a reorganization plan and the function of the Bankruptcy Court and the Commission with respect to creditors of the Debtor.

(f) The res before the Bankruptcy Court is the reorganization proceeding, and all the claims, issues and controversies relating to and affecting the formulation, acceptance and carrying out the Plan, as is forcefully stated by Judge Hutcheson, in his dissenting opinion.

(g) The statement in the majority opinion, that the Benton case and the injunction that was annulled were strictly a suit in personam, is not correct. The sole and only purpose of the Benton case was to defeat the Plan of Reorganization as it related to South Western. The decree sought by the Benton case was that South Western could not convey its property and that, therefore, it could not accept the Plan of Reorganization which contemplated the acquisition of its property. The Benton case proposed to operate upon the Plan and to destroy it as to South Western, by enjoining South Western from accepting the Plan. As the res before the Bankruptcy Court was

the Reorganization Plan, the Benton case was a proceeding against the Plan, and the Benton case was in substance and effect an in rem proceeding. But whether it was or not, it was an invasion of the exclusive jurisdiction of the Bankruptcy Court. The decision in this respect is directly contrary to the decisions of this Court in the cases of Continental Bank & Trust Co. v. Rock Island Ry. 294 U.S. 648, 675, 676; Warren v. Palmer 310 U.S. 132, 137, 138; Gardner, Trustee v. New Jersey 329 U.S. 565, 577; Smith v. Hoboken R.R. Co. 328 U.S. 123, 130; Thompson, Trustee v. Texas Mexican Ry 328 U.S. 134, 142, 143.

(h) The jurisdiction of the Interstate Commerce Commission under Section 5 (11) of the Interstate Commerce Act is exclusive and plenary over the merger and consolidation of railroads and the acquisition of one railroad by another, and under this section, carriers are relieved from the "restraints, limitations and prohibitions of law, Federal and State or municipal in so far as may be necessary to enable them to carry into effect" the transaction approved by the Commission. The Plan provides in its last paragraph (as is usual in all Plans), "That nothing herein contained shall be or be construed as a grant of authority for the issue of any securities, assumption of obligations, *transfer of property,* sale, consolidation or merger of the Debtor's property * * until further action by the Commission upon confirmation of the Plan by the Court" (R. 64). This language is taken from Sub-Section (f) of Section 77 of the Bankruptcy Act. It is for the Commission to find whether the proposed acquisition is supported by proper corporate authority, and the Commission would certainly have power to

relieve against unanimous consent of Stockholders. No Court, State or Federal, has power to usurp this exclusive and plenary power of the Commission. The Commission has expressly reserved this power in the Plan. The majority opinion disregards this question altogether, although it was expressly decided by the District Court. The majority opinion has expressly sanctioned the jurisdiction of the State Court over this matter, although under the Federal law it is expressly reserved to the Commission. The failure of the majority opinion to give effect to the exclusive power of the Commission is directly contrary to the decisions of this Court in the cases of *Thompson, Trustee*, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134; and *Smith* v. *Hoboken R.R. Co.*, 328 U.S. 123; *Palmer, Trustee* v. *Mass.* 308 U.S. 79; *Texas* v. *United States* 292 U.S. 522; *Cleveland, CC & St. L. Ry.* v. *United States* 275 U.S. 404; *New York Central Securities Co.* v. *United States* 287 U.S. 12, 26, 27. The District Court had the right and duty to enjoin the State Court proceeding on this ground, because the Court and the Commission work cooperativley in reorganization. *Palmer* v. *Mass.*, 308 U.S. 79, 87; *Smith* v. *Hoboken*, 328 U.S. 123, 132; *Warren* v. *Palmer*, 310 U.S. 132, 137, 138.

(i) The majority opinion is contrary to and does not consider (1) the provisions of Sub-Section (b) of Section 77 of the Bankruptcy Act, which provides that a plan of reorganization "shall provide adequate means for the execution of the Plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another corporation or corporations, the merger or consolidation of the Debtor with another corporation or cor-

porations, etc."; (2) the provisions of sub-section (f) of Section 77 of the Bankruptcy Act which grant authority to carry out the Plan under the supervision and control of the Judge "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; (3) the provisions in the Plan which give the District Court the power to construe it.

(j) The Commission has the power under Section 5 (11) of the Interstate Commerce Act to authorize the acquisition, even if the law of Georgia should prohibit it, or if the acquisition requires unanimous consent under the law of Georgia, because the Federal law is superior to the State law in this matter.

(k) The majority opinion erred in stating: "For the Bankruptcy Court to hold that a majority vote of the Stockholders of South Western would be sufficient, regardless of State law, would amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the Plan shall have first been approved by the Commission and certified to the Court' ". The Plan has been promulgated by the Commission, and the Court long ago approved the Plan. Certainly, it is competent for the District Court to decide that the Commission has power to approve and allow the acquisition, notwithstanding the Georgia law may be as stated by the State Court Judge, that South Western cannot convey its property without unanimous Stockholder consent. The decision of the Bankruptcy Court does not amend the Plan. The Commission is yet to pass on the question of transfer of property as we have pointed out. The majority opinion in substance and effect turns the State Court loose to decide a question

over which the Commission has exclusive and plenary authority.

(l) The majority opinion erred in holding that the question submitted to the State Court "was peculiarly a question of State law". The question is solely one of Federal law. If it was dissociated from the Reorganization Plan, it would have been peculiarly a question of State law, but when the question relates to the Reorganization Plan it ceases to be a question of State law and becomes a question of Federal law.

(m) The observation of the majority opinion that "A solvent corporation * * cannot be constitutionally compelled against its will to convey to the debtor, etc." is irrelevant. No one is seeking to compel South Western to convey its property "against its will". The Directors of the Corporation and a large majority of the Stockholders are willing and anxious to convey the property. A small minority is seeking to prevent the Corporation from consummating the Plan as it relates to South Western. The District Court simply says that in its opinion this small minority cannot lawfully do this.

(n) The majority opinion states: "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The Plan does not provide that the leased lines may be acquired by a simple majority vote of the Stockholders of the Company". Naturally the Plan did not carry any such provision as suggested. No one ever mooted any incapacity on the part of South Western until the Benton case was filed. Moreover, the matter is one for the exclusive jurisdiction of the Commission

when it comes finally to approve the transfer of properties, and we do not imagine that the question will present any difficulty to the Commission.

(o) The acceptance or rejection by South Western, the conveyance of its property, the disaffirmance of the lease, the waiver of damages for breach of the lease and the waiver of claims for equipment, are all within the framework of the plan over which the Bankruptcy Court necessarily has exclusive jurisdiction.

(p) Under the provisions of Sections 94-328 and 94-329 and Sections 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix of the brief attached to this petition), South Western is authorized to sell its property to the reorganized Company with the assent of a majority of its stock.

(q) Under the exigencies which confront South Western, it has power under Georgia law to convey its property on the vote of a majority of its stock; and this question having been submitted to the Bankruptcy Court and all the necessary parties being before the Bankruptcy Court, it was its right and duty to pass on the question, and the Court of Appeals should have affirmed its action and decision on this question.

(r) The Court erred in holding that a summary proceeding did not lie in the case.

13. The Fifth Circuit Court of Appeals has decided the Federal questions in this case in a way which conflicts with the applicable decisions of this Court (as will appear from the decisions cited herein and in the supporting brief), and has so far departed from the accepted and usual course of judicial proceeding under Section 77 of the Bankruptcy Act, and has so far sanc-

tioned such a departure by a State Court as to call for an exercise of this Court's power of supervision.

14. This petition is accompanied by a certified transcript of the record in the Circuit Court of Appeals, Fifth Circuit, including the proceedings in that Court, in the case of L. O. Benton, Jr., et al., Appellants, vs. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, et al., Appellees, No. 12,130; and ten (10) additional copies thereof. A supporting brief is attached hereto.

WHEREFORE, Petitioners pray that a Writ of Certiorari may be directed to the Fifth Circuit Court of Appeals to bring up the record in said case and to review the decision of that Court in said case, and that the judgment of the Court of Appeals therein may be reversed and set aside.

This 12th day of February, 1948.

Respectfully submitted,

T. M. CUNNINGHAM,
26 Bryan St., East, Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan St., East, Savannah, Ga.

WALTER A. HARRIS,
Persons Building, Macon, Ga.
Attorneys for Merrel P. Callaway, Trustee of the Debtor.

WALLACE MILLER,
Persons Building, Macon, Ga.
Attorney for South Western Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of the Debtor, et al.

Petitioners,

VS.

L. O. BENTON, JR., et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

SUBJECT INDEX

Page

Appendix No. 1

Applicable provisions of Federal Statutes.

Appendix No. 2

Applicable provisions of State Statutes.

Jurisdiction of this Court 1

Statement of the Case 2

Assignments of Errors 4

ARGUMENT

I South Western is a party and a creditor 10

II Mechanics of Plan as to South Western 11

III Commission and Court work cooperatively in reorganization 12

IV Statutory power of Commission over merger and consolidation of carriers and purchase by one carrier of another, exclusive and plenary 12

V Commission has power under Section 5 (11) of Interstate Commerce Act to authorize purchase by one carrier of another on majority vote of stock 13

VI Even if it is the law of Georgia that South Western cannot sell its railroad without unanimous stockholder consent, Commission and Court not bound by any such obstacle in reorganization 14

Page

VII The Federal Statutes supersede conflicting State Laws, and are not invalid if they operate collaterally to impair contracts 16

VIII The question of validity of the conveyance of South Western in pursuance of reorganization plan is a Federal question 17

IX The Bankruptcy Court has prior and exclusive jurisdiction 18

X The possession of the property by the Bankruptcy Court in connection with reorganization plan, gave Bankruptcy Court exclusive jurisdiction 19

XI Bankruptcy Court not at liberty to surrender its jurisdiction, especially in a case of this kind 20

XII There is no reason why this matter should be remitted to State Court to decide 20

XIII The State Court having acted in excess of its jurisdiction, the Bankruptcy Court had power to annul the order of State Court 21

XIV South Western had power under exigencies of case to sell its railroad on the vote of a majority of its stock 21

XV Bankruptcy Court has power to proceed summarily and its process runs in all jurisdictions 23

TABLE OF CASES

	Page
Alexander v. A. & W.P. R.R. Co., 108 Ga. 151	22
Baldwin, Ex Parte, 291 U.S. 610, 615	19, 24
Bassett v. City Bk. & Tr. Co., 116 Conn. 617; 165 Atl. 557	22
Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629; 142 N. W. 434	22
Burnet v. Harmel, 287 U.S. 103	17
Calnan v. Guaranty Security Corp., 271 Mass. 531; 171 N.E. 830	22
Central of Ga. Ry. Co. Reorganization, 261 I.C.C. 263, 501, 515	10
Central R.R. Co. of New Jersey, 163 F. (2d) 44	20
Cleveland, C.C. & St. L. Ry. Co. v. U.S., 275 U.S. 404	15
Continental Bk. & Tr. Co. v. Rock Island R. Co., 294 U.S. 648, 676	17, 18, 19, 23
Dady v. Ga. & Ala. R. Co., 112 Fed. 838	13
Deitrick, Receiver, v. Greaney, 309 U.S. 190	17
D'Oench Duhme & Co. v. F.D.I.C., 315 U.S. 447	17
Gardner, Trustee, v. New Jersey, 329 U.S. 565	19
Geddes v. Anaconda Copper Mining Co., 254 U.S. 590	22
Group of Investors v. Milwaukee R.R. Co., 318 U.S. 523, 549	11
Hanover Nat. Bk. v. Moyses, 186 U.S. 181, 188	17
Inhabitants of Waldoborough v. Knox. & L.R. Co., 24 Atl. 942	22
Isaac v. Hobbs Tie & Timber Co., 282 U.S. 734, 739	20
Kline v. Burke Const. Co., 260 U.S. 226, 231	19
Local Loan Co. v. Hunt, 292 U.S. 234, 239, 240	23
Looney v. Eastern Texas R. Co., 247 U.S. 214, 221	19
Markham, Alien Property Custodian v. Allen, 326 U.S. 490, 495	20
Meredith v. Winter Haven, 320 U.S. 228	20
Missouri Pacific, In re, 39 F. Supp. 436	15
Morgan, Extr. v. Commissioner, 309 U.S. 78	17
Murphy v. John Hofman Co., 211 U.S. 562, 569	23
New York Central Securities Co. v. U.S., 287 U.S. 12, 24, 26	15
New York, N.H. & H.R. Co., In re, 147 F. (2d) 40	15
New York, N.H. & H.R. Co., In re, 54 Supp. 595, 624	17, 20
New York v. U.S., 257 U.S. 591, 592, 600, 601	17

	Page
Old Colony Bondholders v. N.Y., N.H. & H.R. Co., 161 F. (2d) 413, 424	11
Palmer v. Mass., 308 U.S. 79, 87	12, 15
Paterson v. Shattuck Arizona Copper Co., 168 Minn. 611; 244 N.W. 281	22
Pere Marquette R. Co. Merger, 267 I.C.C. 207	16
Pittsburg Railways Co., 155 F. (2d) 477	15
Plant v. Macon Oil & Ice Co., 103 Ga. 666	22
Prudence Realization Corp. v. Geist, Trustee, 316 U.S. 89	17
Smith v. Hoboken R.R. Co., 328 U.S. 123, 132	12, 13, 19
Southern Pacific Co., Reincorporation, 267 I.C.C.	16
Standard Gas & E. Co., 139 F. (2d) 149, 153	24
Standard Gas & E. Co., 119 F. (2d) 658, 663	24
Thompson, Trustee, v. Magnolia Petroleum Co., 309 U.S. 478	20
Thompson, Trustee v. Texas Mexican Ry. Co., 328 U.S. 134	13, 19
Texas v. U.S., 292 U.S. 522, 534	15
Theis v. Spokane Falls G. & L. Co., 49 Wash. 477	14
U.S. v. Pelzer, 312 U.S. 399, 402, 403	17
U.S. v. Walker, 109 U.S. 258	21
U.S. Fidelity Co. v. Bray, 225 U.S. 205, 218	20
Wabash R.R. v. Adelbert College, 208 U.S. 38	23
Warren v. Palmer, 310 U.S. 132, 137, 138	12, 19
Wheeling & Lake Erie Co. Control, 267 I.C.C.	16
Williams v. Green Bay & W.R. Co., 326 U.S. 549	20
Wragg v. Federal Land Bank, 317 U.S. 325	17

Page

ACTS OF CONGRESS CITED:

Bankruptcy Act:

Sec. 2 (15))
Sec. 77 (a))
Sec. 77 (b)) Copied in Appendix No. 1
Sec. 77 (c) (6))
Sec. 77 (f))
Sec. 77 (p))

Sec. 24 Judicial Code 1

Interstate Commerce Act:

Sec. 1 (3))
Sec. 1 (18))
Sec. 1 (20)) Copied in Appendix No. 1
Sec. 5 (2) (a))
Sec. 5 (2) (b))
Sec. 5 (11))

GEORGIA CONSTITUTION AND CODE SECTIONS:

Code Section 94-311)
Code Section 94-318) Copied in Appendix No. 2
Code Section 94-328)
Code Section 94-329)

Constitution, Art. XII, Sec. I, Par. 1 16

TEXT BOOKS:

21 Corpus Juris Secundum, pp. 177, 178 21
Fletcher Cyclopedia Corporations, Section 5797 21
Fletcher Cyclopedia Corporations, Sections 2946, 2947 .. 21
30 Harvard Law Review 335, 358 22
I High on Injunctions, Section 302 23
Morawetz on Private Corporations (2nd Ed) Sec. 413 .. 21
Noyes on Intercorporate Relations (2nd Ed) Sec. 110, 111 . 22
5 Remington on Bankruptcy, Sec. 2193.50, 2517 23

IN THE

SUPREME COURT OF THE UNITED STATES

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

Petition for Writ of Certiorari

BRIEF IN SUPPORT OF THE PETITION

JURISDICTION OF THIS COURT.

The petition seeks a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the case of L. O. Benton, Jr., et al., Appellants, vs. Merrel P. Callaway, as Trustee of the property of Central of Georgia Railway Company, Debtor, and South Western Railroad Company, Appellees, No. 12,130.

This Court has jurisdiction to review the judgment in question under Judicial Code Section 240, as amended, (U.S.C.A., Title 28, Section 347).

Neither the case in the United States District Court nor in the Court of Appeals is reported. The decision of the District Court is in the Record, p. 48, et seq., and the decision of the Court of Appeals is attached to the record.

STATEMENT OF THE CASE.

There are no facts in dispute. The facts are contained in the findings of fact by the District Court (R. 48-74) and in a stipulation (R. 98-100).

The Central of Georgia Railway Company (herein called the debtor) is being reorganized under Section 77 of the Bankruptcy Act. The Commission's plan of reorganization of the debtor was approved by the reorganization court on June 24, 1946. Under the approved plan, which has been confirmed and is awaiting consummation, South Western Railroad was allotted certain securities of the reorganized company in exchange for its railroad properties. The plan provided that South Western should accept or reject its provisions on or before March 28, 1947, or waive its right thereafter either to accept or reject the plan. The plan further provides that if South Western failed to accept the plan its lease would be disaffirmed. South Western accepted the plan on March 28, 1947, on a majority vote of its stockholders, as authorized and provided by applicable State statute. (Code of Georgia of 1933, Sect. 94-328, copied in Appendix 2 of this brief). The railroads of South Western have been leased to the debtor for many years and are in the possession of the debtor's trustee. This leased line is an important and integral part of the system of the debtor, and the Commission has found that it is in the public interest that it should be acquired by the reorganized Company.

L. O. Benton, Jr., et al., minority stockholders of South Western, brought a suit in equity in the Superior Court of Bibb County, Georgia, against South Western and its Officers and Directors to enjoin the conveyance

by South Western of its property to the reorganized Company, and to enjoin the consummation of the Plan as it relates to South Western (R. 133-165). The gravamen of this suit is that South Western has no power under its Charter to divest itself of its railroad. A rule to show cause, why an interlocutory injunction should not be granted, was issued (R. 161). A hearing was had on the rule to show cause but before any decision was had thereon, Merrel P. Callaway, as Trustee of the Debtor, brought a summary, ancillary proceeding in the United States District Court for the Southern District of Georgia, (in which the Bankruptcy case was pending) against L. O. Benton, Jr., et al., to enjoin them from further prosecuting their case in the State Court on the grounds that the Bankruptcy Court and the Interstate Commerce Commission had prior and exclusive jurisdiction of the subject matter of the suit of L. O. Benton, Jr., et al. South Western was also made a party to this proceeding (R. 1). The District Judge issued a temporary restraining order on this petition (R. 10).

Thereafter the State Court Judge of his own motion issued an interlocutory injunction against South Western and its Officers and Directors enjoining them from accepting the Plan (although South Western had already accepted the Plan), from making any conveyance of its property and from taking any action to consummate the Plan of Reorganization as it related to South Western, except upon unanimous consent of its stockholders (R. 246-249).

Thereupon Merrel P. Callaway, as Trustee of the Debtor amended his petition and called the attention of the District Court to the injunction of the State

Court Judge and prayed that it should be adjudged to be null and void as an invasion of the prior and exclusive jurisdiction of the Bankruptcy Court and the Commission; and all the parties being before the Bankruptcy Court, this amended petition further prayed that the District Court would adjudicate the question whether South Western could convey its property and accept the Plan without unanimous consent of its stockholders. (R. 32). The District Court, after hearing, issued its order that it and the Commission had prior and exclusive jurisdiction, that the order of the State Court Judge was null and void, and that L. O. Benton, Jr., et al., and all other stockholders of South Western should be perpetually enjoined from prosecuting the suit or any similar suit, except in the Bankruptcy Court (R. 92). The Court in its opinion held that South Western had power under the circumstances of this case to convey its property on the vote of a majority of the stock of the Company (R. 86-88).

L. O. Benton, Jr., et al., appealed to the United States Circuit Court of Appeals, Fifth Circuit, and that Court in a majority opinion rendered January 13, 1948, by Judges Holmes and Lee (Judge Hutcheson dissenting), decided that the judgment appealed from should be reversed, the injunction dissolved, and the Cause remanded for further proceedings not inconsistent with the opinion. The petition for certiorari seeks to bring this decision before the Supreme Court for review and reversal.

ASSIGNMENTS OF ERROR

Error is assigned on the decision and judgment of the Circuit Court of Appeals, Fifth Circuit, in the above stated case as follows:

(1) South Western is a creditor of the Debtor and a party to the reorganization proceedings.

(2) The Commission's Plan approved by the Court provided that unless South Western accepted the provisions of the plan with respect to the sale of its railroad properties to the reorganized Company its lease would be disaffirmed.

(3) The Commission has the power under the Bankruptcy Act to prescribe in its plan of reorganization of the Debtor the conditions upon which the executory contracts of the Debtor (including unexpired leases) may be rejected.

(4) The purpose of the Benton case and the injunction granted by the State Court Judge was to defeat the Reorganization Plan, as it related to South Western.

(5) The Benton case was not strictly a suit in personam; it was directed at the Reorganization Plan which was the Bankruptcy res, on which it proposed to operate through the injunction against South Western.

(6) The res before the Bankruptcy Court is the reorganization proceeding and the claims and controversy relating to and effecting the formulation, acceptance and carrying out the Plan.

(7) The res was not the reversionary interest of South Western in its leased property.

(8) The Bankruptcy Court had prior and exclusive jurisdiction over the matter of the acceptance or rejection of the Reorganization Plan by South Western.

(9) The exclusive jurisdiction of the bankruptcy court in this case rests upon the express provisions of the Bankruptcy Act with respect to the reorganization of railroads, which authorizes a plan of reorganization modifying or altering the rights of creditors generally, or any class of them; rejecting the contracts of the debtor, which are executory in whole or in part, including unexpired leases; and defining "creditors" to include for all purposes of the Act all holders of claims of whatever character against the debtor, "including the holder of a claim under a contract executory in whole or in part, including an unexpired lease."

(10) The exclusive jurisdiction of the Bankruptcy Court rests on the proposition that the acceptance or rejection of the approved plan of reorganization of the debtor by South Western Railroad, and the disaffirmance of its lease in the event it rejected the plan, and the validity of South Western's acceptance, and the consummation of the acceptance, are all within the framework of the plan of reorganization.

(11) The bankruptcy court has prior and exclusive jurisdiction, also, because the railroad property of the South Western is in the possession of the court. South Western is a party to the reorganization proceeding, and the Commission by its plan of reorganization with respect to South Western, has, in the public interest, required South Western to accept the plan under penalty of having its lease disaffirmed.

(12) The powers of the Bankruptcy Court and the powers of the Interstate Commerce Commission are brigaded for the purposes of reorganization. The

jurisdiction of the Commission under Section 5 of the Interstate Commerce Act in the matter of merger or consolidation of carriers or the acquisition of one carrier by another, is exclusive and plenary and the Benton suit and the injunction issued by the State Court in that suit transgress the jurisdiction of the Commission and undertake to prejudge a question which is within the exclusive power of the Commission.

(13) Under Section 5 (11) of the Interstate Commerce Act carriers are relieved from the "restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary" to enable carriers to carry into effect the acquisition of one carrier by another. The Court of Appeals failed to give effect to this Statute. The Benton suit usurps the power conferred on the Commission.

(14) The Benton case and the injunction of the State Court Judge therein and the decision of the Court of Appeals are contrary to and do not consider (1) the provisions of Sub-section (b) of Section 77 of the Bankruptcy Act which provides that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the Debtor to another Corporation or Corporations, the merger or consolidation of the Debtor with another Corporation or Corporations, etc."; (2) the provisions of subsection (f) of Section 77 of the Bankruptcy Act, which grant authority to carry out the plan under the supervision and control of the judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"; and

(3) the provisions in the plan which give the District Court power to construe it.

(15) The Court of Appeals erred in stating in its opinion "For the Bankruptcy Court to hold that a majority vote of the stockholders of South Western would be sufficient, regardless of State law, would amount to amending the Plan in the face of the Statute which provides that no plan shall be approved or confirmed by the Judge 'unless the plan has been approved by the Commission and certified to the Court' ". The plan was promulgated by the Commission and the Court approved it June 24, 1946, before the Benton suit was commenced (R. 62). The decision of the Bankruptcy Court that South Western had power to convey its property on the vote of a majority of its stock and without unanimous stockholder consent is in no sense an amendment of the plan.

(16) The Court of Appeals erred in holding that the question submitted in the Benton case to the State Court "was peculiarly a question of State law". It would have been if it had been disassociated from the reorganization plan. It was purely a question of Federal law whether in pursuance of the plan the acceptance of South Western was valid and sufficient and was a matter over which the Commission had exclusive jurisdiction.

(17) The observation of the Court of Appeals in the majority opinion that "A solvent corporation * * cannot be constitutionally compelled against its will to convey to the Debtor" is irrelevant. No one is seeking to compel South Western to convey its property against

its will. It has offered to do so by the vote of a large majority of its stock. A small minority of stockholders is trying to prevent the corporation from consummating its wishes, on the theory that a conveyance cannot be made without unanimous stockholder consent.

(18) The observation of the majority opinion of the Court of Appeals that "There is nothing in the plan to indicate that an ultra vires acceptance is authorized or required or that any State law which prohibits acceptance should be disregarded. The plan does not provide that the leased lines may be acquired by a simple majority vote of the stockholders of the Company". Naturally, the plan does not carry any such provisions. The Federal Statutes which have been quoted above confer on the Commission exclusive and plenary power over the acquisition of the property of one carrier by another, and it is presumed that when the plan is to be consummated the Commission will pass on the question whether the acquisition can be effected, and if there is any such obstacle in the State law that it requires unanimous stockholder consent, the Commission has ample power, if it holds that the acquisition is in the public interest, to disregard any such unreasonable obstacle.

(19) Under the provisions of Sections 94-328, 94-329, 94-311 and 94-318 of the Code of Georgia (which are copied in the Appendix No. 2 of this brief) South Western is authorized to sell its property to the reorganized Company with the assent of the majority of its stock.

(20) Under the exigencies which confront South Western it has power under Georgia law to convey its

property on the vote of a majority of its stock, and this question the Bankruptcy Court had the power to decide, all the parties being before the Court; and the Court of Appeals should have affirmed the judgment of the District Court in this respect.

(21) The Court of Appeals erred in holding that a summary proceeding, by ancillary petition in the Bankruptcy Court did not lie to protect its jurisdiction.

ARGUMENT.

(The Plan is copied in 261 I.C.C. Rep. 515 Appendix 3. The applicable provisions of the Interstate Commerce Act and of Section 77 of the Bankruptcy Act are copied in Appendix No. 1; Code Sections 94-328, 94-329, 94-311 and 94-318 of the Georgia Code are copied in Appendix No. 2).

I

South Western is a party to the Plan and a Creditor.

South Western all through the proceedings has litigated the allotment made to it in the Plan. It contested the Segregation Formula and the Severance Studies. It has filed a claim for equipment, which is undetermined; a claim for a declaratory judgment as to its rights if its lease is rejected, which was refused by the Court on the ground that this matter was within the exclusive jurisdiction of the Commission (R. 65).

The offer to South Western is made in the Plan, its acceptance was made in the Plan, and its consummation must be made in pursuance of and within the frame work of the Plan. If there is any question as to whether the acceptance is supported by the necessary corporate authority, that is a question for the Bank-

ruptcy Court and should not be permitted to be litigated in a separate State Court proceeding, to which the Trustee of the Debtor is not a party.

The term "Creditor" is defined in Section 77 (b) of the Bankruptcy Act.

In the Milwaukee case the Terre Haute, a leased line, was held to be a creditor.

Group of Investors v. *Milwaukee R. Co.*, 318 U.S. 523, 549.

See also: *Old Colony Bondholders* v. *N.Y., N.H. & H.R. Co.*, 161 F. (2d) 413, 424.

II

The mechanics of the Plan as it affects South Western.

The Plan makes an offer to South Western for its railroad properties. If it does not accept, its lease is disaffirmed. If the railroads are acquired, it "shall be conveyed to the reorganized Company". Whether the acquisition is to be by purchase, merger or consolidation shall "subject to the approval of the Commission and the Court, be determined by the Trustee or the Reorganization Managers when they begin to function", (R. 63, 64). South Western has accepted the Plan on the vote of a large majority of its stock (R. 67). Under the provisions of sub-Section (f) of Section 77 of the Bankruptcy Act, securities cannot be issued, obligations assumed, property transferred or consolidation or merger effected "until further action by the Commission upon confirmation of the Plan by the Court". This

provision of the Statute is carried forward in the Plan (last provision of the Plan, R. p. 64). The Plan provides that its construction by the Court shall be final and conclusive, (R. 100).

All of this is wholly contrary to and inconsistent with a proceeding in the State Court to hold up the consummation of the Plan as to South Western on the petition of minority stockholders of South Western. If the question could be litigated in any Court, the Bankruptcy Court is the only Court it could be litigated in. Of course, the decision of the State Court that the conveyance could not be made except on unanimous stockholder consent, is equivalent to a denial of the power of the Commission over the matter of sale and consolidations of railroads.

III

The functions of the Commission and the Bankruptcy Court work cooperatively in reorganization under Section 77 of the Bankruptcy Act.

Palmer v. *Massachusetts*, 308 U.S. 79, 87.

Smith v. *Hoboken R.R.*, 328 U.S. 123, 132.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

IV

The statutory power of the Commission over the merger, consolidation and purchase of one railroad by another, is exclusive and plenary and no court has any power to interfere therewith.

Section 5 (11) of the Interstate Commerce Act provides "The authority conferred by this section shall be exclusive and plenary".

Sub-Section (f) of Section 77 of the Bankruptcy Act as set forth above preserves this exclusive power of the Commission in the consummation of a Plan of Reorganization, and the Plan, itself, as we have said, carries the words of the Statute.

This Court has upheld this exclusive power of the Commission in two recent notable cases, which are decisive of this case:

Smith v. *Hoboken R.R. Co.*, 328 U.S. 123.

Thompson, Trustee, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134.

V

The Commission has full power to authorize a purchase, merger, or consolidation on the vote of a majority of the stock unless a different vote is required under applicable State laws, in which case the number so required shall assent.

Section 5 (11) of the Interstate Commerce Act makes this provision in terms.

The Statute law of Georgia is contained in Code Sections 94-328, 94-329, 94-311 and 94-318 (copied in Appendix No. 2). Under these Statutes all that is required is the vote of a majority of the stock. Code Sections 94-311 and 94-318 do not specify the vote necessary but it has been decided that a majority vote is sufficient.

Dady v. *Georgia & Alabama R. Co.*, 112 Fed. 838.

Code Sections 94-311 and 94-318 are part of the General Railroad Laws of Georgia, under which the

Debtor is incorporated. Power given under these latter Code Sections confers power on both Corporations to consolidate or sell.

Theis v. *Spokane Falls Gas Light Co.*, 49 Wash. 477; 95 Pac. 1074, 1079, 1080.

There is no other applicable State Law on the subject in Georgia.

We think Section 5 (11) is referring to Statute Law, and if there is no different Statutory law in the State, the majority rule of the Federal Statute must prevail.

The Commission would not be bound to follow a decision of the Georgia Court, that unanimous Stockholder consent is necessary, because this would nullify altogether the power of the Commission in the premises. Moreover, this would be wholly inconsistent with the other provisions of Section 5 (11).

VI

Even if it is the law of Georgia that South Western cannot sell its property without unanimous stockholder consent, the Commission and the Court would not be bound by any such law in a reorganization plan under Section 77 of the Bankruptcy Act.

Section 5 (11) of the Interstate Commerce Act provides that a sale, merger, or consolidation under this Act does not require State authority, that the carrier is relieved from the operation of the Anti-Trust Law and all other restraints, limitations and prohibitions of law, Federal, State or municipal, in so far as may be necessary to carry the transaction into effect.

(This Court has held that the above immunity is not limited to matters of the same genus as anti-trust legislation.

New York Central Securities Co. v. *U.S.*, 287 U.S. 12, 26.

Texas v. *U. S.*, 292 U.S. 522, 534).

Sub-Section (b) of the Bankruptcy Act provides that the Plan shall include provisions modifying or altering the rights of creditors generally; and Sub-Section (f) provides that the Judge may require all other proper and necessary parties to make transfers and conveyances, and provides that upon confirmation of the Plan it shall be carried out under the supervision of the Judge, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

The following decisions firmly establish the proposition that an incompatible provision of State law cannot stand in the way of the purchase of South Western by the reorganized Company.

Palmer, Trustee, v. *Massachusetts,* 308 U.S., 79, 88.

In re *New York, N.H. & H.R. Co.*, 147 F. (2d) 40.

Texas v. *United States,* 292 U.S. 522, affirming 6 F. Supp. 63.

In re *Missouri Pacific R. Co.*, 39 F. Supp. 436.

Cleveland, C.C. & St. L. Ry. Co. v. *United States,* 275 U.S. 404.

New York Central Securities Co. v. *United States,* 287 U.S. 12, 26, 27.

In re *Pittsburgh Railways Co.*, 155 F. (2d) 477.

Three late decisions of the Commission also hold that in the sale or consolidation of railroads, the Commission has power to disregard limitations and restrictions of State laws under the provisions of Section 5 (11) of the Interstate Commerce Act:

Pere Marquette R. Co. Merger, 267 I.C.C. 207, decided April 1, 1947.

Wheeling and Lake Erie Co. Control, 267 I.C.C.—, decided June 25, 1947.

Southern Pacific Co. Reincorporation, 267 I.C.C.—, decided August 18, 1947.

VII

The provisions of the Interstate Commerce Act and of the Bankruptcy Act supersede conflicting State laws and are not invalid if they operate collaterally to impair contracts.

The theory of Respondents is that South Western Charter is a contract between its Stockholders and as no power to sell is contained in the Charter, that the Code Sections which we have quoted in Point V which confer power to sell on a majority vote, impair the obligation of the contract. The first answer to this is that conferring power to sell on a majority vote does not impair the contract, because the contract was silent on this subject; the second answer is that if these Code Sections are struck down, then there is no Statute law of the State of Georgia and the Federal law, Sec. 5 (11) of the Interstate Commerce Act would be operative, and the third and conclusive answer is that the Federal law on the subject supersedes the State Laws. This is fundamental. The Constitution of the State of Georgia recognizes the supremacy of the Federal law. (Art. XII, Sec. 1, Par. 1).

The Federal law is not invalid, although it may operate collaterally to impair contracts.

Continental Bank & Trust Co. v. *Chicago, R.I. & P. R.R. Co.*, 294 U.S. 648, 680.

Hanover National Bank v. *Moyses*, 186 U.S. 181, 188.

New York v. *United States*, 257 U.S. 591, 592, 600, 601.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 623, 624.

VIII

The question of the validity of the conveyance under which South Western is to be acquired by the reorganized Company is a question of Federal law and not a question of State law.

The property is to be acquired under and in pursuance of a plan of reorganization. Both the Bankruptcy Act and the Interstate Commerce Act are involved and the question arises in connection with the carrying out and consummation of the plan.

Burnet v. *Harmel*, 287 U.S. 103.

Morgan, Executor, v. *Commissioner*, 309 U.S. 78.

Deitrick, Receiver, v. *Greaney*, 309 U.S. 190.

D'Oench Duhme & Co. v. *F. D. I. C.*, 315 U.S. 447.

United States v. *Pelzer*, 312 U.S. 399, 402, 408.

Prudence Realization Corporation v. Geist, Trustee, 316 U.S. 89.

Wragg v. *Federal Land Bank*, 317 U.S. 325.

IX

The Bankruptcy Court has prior and exclusive jurisdiction.

The majority opinion of the Court of Appeals grows out of a total misapprehension of the scope and purpose of the Bankruptcy proceedings. As stated by this Court in Continental Bank & Trust Co. v. Rock Island R. Co., 294 U.S. 648, 676, "A proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding, which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end, the accomplishment of which was the sole aim of the section and thereby to render its provisions futile."

Judge Hutcheson has pointed out in his dissenting opinion that the res is the "reorganization proceeding, including its controversies and questions, and the plan it was instituted to bring about * * its formulation, acceptance and carrying out".

The Commission has decided that it is in the public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral and important part of the system of the Central. The Benton suit is aimed at the prevention of this prime objective of the plan.

The theory of the majority opinion is that the reversionary interest of South Western is the subject matter of the purchase proposed to be made by the reorganized Company, that this interest is not in the possession of the Bankruptcy Court and, therefore, the State Court has jurisdiction over the question whether the South Western has the legal capacity to sell this

interest to the reorganized Company. The thing which the reorganized Company must have is not a mere reversionary interest in the property. The Plan proposes that the reorganized Company shall acquire certain specific lines of railroads. The reorganized Company must not only acquire the so-called reversionary interest, it must acquire the leasehold interest; that is, the fee simple title to this railroad property. It cannot be split up into segments for the purposes of reorganization. The theory of the majority opinion is very attenuated, and unreal, and failed to recognize the central fact, which is, that the State Court case was brought for the sole purpose of preventing the consummation of the Plan as it relates to South Western.

The jurisdiciton of the Bankruptcy Court is exclusive. Section 77 (b) of the Bankruptcy Act.

Continental Bank & Tr. Co. v. *Rock Island R. Co.*, 294 U.S. 648, 675, 676,

Smith v. *Hoboken R. Co.*, 328 U.S. 123, 130.

Thompson, Trustee, v. *Texas-Mexican Ry. Co.*, 328 U.S. 134, 139, 142, 143.

Warren v. *Palmer*, 310 U.S. 132, 137, 138.

Gardner, Trustee, v. *New Jersey*, 329, U.S. 565, 577.

X

The District Court had possession of the property and prior jurisdiction, and, therefore, it had the power to enjoin the parties plaintiff in the Benton Case from proceeding in the State Court.

Section 77 (b) of the Bankruptcy Act.

Kline v. *Burke Construction Co.*, 260, U.S. 226, 231.

Looney v. *Eastern Texas R. Co.*, 247 U.S. 214, 221.

Ex Parte Baldwin, 291 U.S. 610, 615.

XI

A Bankruptcy Court is ordinarily not at liberty to surrender its jurisdiction, and especially so in a case of this kind.

Isaac v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739.

United States Fidelity Co. v. *Bray*,
225 U.S. 205, 218.

In re *New York, N.H. & H.R. Co.*,
54 F. Supp. 595, 624.

XII

There is no reason why this matter should be remitted to the State Court to decide.

Meredith v. *Winter Haven*, 320 U.S. 288.

In re *New York, N.H. & H.R. Co.*,
54 Fed. Supp. 595, 624.

Markham, Alien Property Custodian, v. *Allen*,
326 U.S. 490, 495.

Williams v. *Green Bay & W.R. Co.*, 326 U.S. 549.

The principle of "forum non conviens" has no application here and for that reason the two following cases relied on by Respondents are inapplicable.

Thompson, Trustee, v. *Magnolia Petroleum Co.*,
309 U.S. 478.

In re *Central R.R. Co. of New Jersey*,
163 F (2d) 44.

XIII

The State Court, having acted in excess of its jurisdiction, the Bankruptcy Court had power to annul and set aside its decree.

21 *Corpus Juris Secundum*, pp. 177, 178 and cases cited under Note 2.

United States v. *Walker*, 109 U.S. 258, (reviewing many cases on the subject).

XIV

In the exigencies which confront South Western, it clearly has power under Georgia Law to sell its railroad property on the vote of a majority of its stock.

The only Statute Law of Georgia on the subject is Code Sections 94-328, 94-329, 94-311 and 94-318, copied in Appendix 2. Under these sections of the Code the State has consented to the sale so that South Western stands in the same position as to sale of its property as does a private corporation.

The findings of fact by the District Court and the four letters written by the President of South Western to its Stockholders (R. pp. 68 to 72, inc.), show that South Western cannot operate its own property, and that if Central operates for its account, that South Western would in time become insolvent.

The modern authorities are to the effect that when a corporation finds itself in the predicament of South Western that it can sell all its property and liquidate on a majority vote of its Stockholders.

Fletcher Cyc. Corporations, Sections 2946, 2947, 5797.

Morawetz on Private Corp. (2nd Ed.) Section 413.

Plant v. *Macon Oil & Ice Co.*, 103 Ga. 666.

Noyes (2 ed.) *Intercorporate Relations*, Sections 110, 111.

Professor Warren, 30 *Harvard Law Review*, pp. 835, 858.

Geddes v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 595, 597, 598.

Patterson v. *Shattuck Arizona Copper Co.*, 168 Minn. 611, 244 N.W. 281 (Citing many cases and text books).

Calnan v. *Guaranty Security Corp.*, 271 Mass. 531; 171 N.E. 830.

Beidenkopt v. *DesMoines Life Ins. Co.*, 160 Iowa 629; 142 N.W. 434.

Inhabitants of Waldoboro v. *Knoxville & L.R. Co.*, 24 Atl. 942.

Bassett v. *City Bank & Tr. Co.*, 116 Conn. 617; 165 Atl. 557.

The District Court having all the parties before it, could and should have decided this question as it did.

The case of *Alexander* v. *Atlanta & West Point R.R. Co.*, 180 Ga. 151 (relied on by Respondent) holds that this Company which was chartered by a special Act, could not amend its Charter, and adopt all the

provisions of the general railroad law of Georgia, which was a material amendment of its Charter, without unanimous vote of its Stockholders (notice particularly the last paragraph of the decision). This is a very different question from the question in the case at bar, whether South Western in the predicament in which it finds itself, is bound to languish and die for want of unanimous consent of its Stockholders.

XV

Bankruptcy Court has power, in a case like this, to proceed summarily, by Ancillary Petition, and its process runs in all judicial Districts.

On the power of the Court to proceed summarily.

I High on Injunctions, Section 302.

5 Remington on Bankruptcy, Sections 2193.50, 2517.

Continental Bank v. Rock Island Ry., 294 U.S. 648, 681, 682.

Local Loan Co. v. Hunt, 292 U.S. 234, 239, 240.

Murphy v. John Hofman Co., 211 U.S. 562, 569.

Wabash R.R. v. Adelbert College, 208 U.S. 38.

On the point that process runs in all districts.

Continental Bank v. Rock Island Ry., 294 U.S. 648, 681-684.

In re Standard Gas & Electric Co., 189 F. (2d) 149, 153.

In re Standard Gas & Electric Co., 119 F. (2d) 658, 663.

Ex Parte Baldwin, 291 U.S. 610, 615.

Respectfully submitted,

T. M. CUNNINGHAM,
26 Bryan St., East, Savannah, Ga.

A. R. LAWTON, JR.
26 Bryan St., East, Savannah, Ga.

WALTER A. HARRIS,
Persons Building, Macon, Ga.

Attorneys for Merrel P. Callaway, Trustee of the Debtor.

WALLACE MILLER,
Persons Building, Macon, Ga.
Attorney for South Western Railroad Company.

Dated February 12, 1948.

APPENDIX No. 1

Applicable Sections of the Interstate Commerce Act and of the Bankruptcy Act. (Italics ours).

Provisions of the Interstate Commerce Act.

Section 1, Paragraph (18), provides:

"No carrier by railroad *** shall acquire or operate any line of railroad *** unless and until there shall first have been obtained from the Commission, a certificate that the present or future public convenience and necessity require the *** operation *** and no carrier by railroad shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1, Paragraph 20, provides:

"The Commission *** may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require *** Any operation contrary to the provisions of this paragraph may be enjoined by any court of compet t jurisdiction at the suit of *** any party in interest."

Section 5, Paragraph 2 (a), requires approval and authorization of the Interstate Commerce Commission for two or more carriers to consolidate, merge, or for any carrier to purchase, lease or contract to operate the property of another carrier.

Section 5, Paragraph (2) (b) provides:

"If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), *and will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction."

Section 5 (4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of paragraph (a) thereof."

Section 5, Paragraph 11, provides:

"The authority conferred by this Section *shall be exclusive and plenary,* and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation or corporate merger, *of a majority unless a different vote is required under applicable State law, in which case the number so required shall assent* of the votes of the holders of the shares entitled to vote of the capital stock of such corporation ***) to carry such transaction into effect and to own and operate any properties and to own and exercise any control or franchises acquired through said transaction *without invoking any approval under State authority,* and any carriers or other corporations, and their officers or employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved

from the operation of the anti-trust laws and of all other *restraints, limitations and prohibitions of law, Federal, State or municipal in so far as may be necessary,* to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. Nothing in this Section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, *but any power granted by this Section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".*

Provisions of Sec. 77 of the Bankruptcy Act.

Sub-Section (a) provides:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity for the property of the debtor for any purpose. Process of the Court shall extend to and be valid when served in any judicial district."

Sub-Section (b) provides:

"A plan of reorganization within the meaning of this Section (1) shall include provisions modifying or altering the rights of creditors gen-

erally or of any class of them, secured or unsecured, either through the issuance of new securities of any class or otherwise *** (5) shall provide adequate means for the execution of the plan *which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations **** *the amendment of the charter of the debtor* *** may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this Section. The adoption of an executory contract or unexpired lease by the Trustee or Trustees of a debtor shall not preclude the rejection of such a contract or lease in a plan of reorganizaiton approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor, because such contract or lease had been previously adopted."

Sub-Section (c) (6) provides:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the Judge shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the Judge to begin the operation of such line, unless the Judge upon the petition of the lessor shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of the Interstate Commerce Act as amended."

Sub-Section (f) provides:

"Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. *** upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

Sub-Section (f) further provides:

"The Judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor *and all other proper and necessary parties* to make any such transfer or conveyance and may require the debtor to join in any such transfer or conveyance made by the trustee or the trustees.

Section 2 (15) of the Bankruptcy Act provides that bankruptcy courts may "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act: provided, however, that an injunction to restrain a court may be issued by the Judge only".

APPENDIX No. 2

Applicable Sections of the Code of Georgia of 1933.

94-328. "AUTHORITY TO SELL OR LEASE RAILROAD. Any railroad corporation organized under the laws of this State, which has heretofore leased its property for a long term of years to another corporation, which lease has terminated, and the lessor is not a going concern or equipped to conduct the operations of a railroad company, is hereby authorized to sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933, p. 235)."

94-329. "RIGHTS ACQUIRED. The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property, rights, and franchises of the selling, or lessor, corporation. (Acts 1933, p. 235)."

The above two Code Sections are codified from the Act of 1933, p. 235.

Code Section 94-311. "Any railroad company incorporated under this Title shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said companies to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company and hold,

use, and occupy the same in such manner as they may deem most beneficial to their interests: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law. (Acts 1892, p. 49)."

Code Section 94-318. "Any railroad Company incorporated under the provisions of this title shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without the state shall connect with or form a continuous line with the railroad incorporated under the law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this title may purchase, lease, consolidate with, absorb and merge into itself the stock, property and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with and form a continuous line or system with the railroad of such company incorporated under this title upon such terms as may be agreed upon."

The above two Code Sections are a part of Title 94 of the Code of Georgia of 1933, which contains the law for the incorporation of railroad companies and was passed in 1892 (Acts 1892, pp. 49, 51).